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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

* * *

NO. 79-5837

* * *

IN RE

R. G. S.

* * *

ON APPEAL
FROM THE SUPREME COURT OF TEXAS

* * *

MOTION TO AFFIRM

* * *

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

The State of Texas, Appellee in the above entitled cause, moves to affirm the decision below on the ground that the questions presented are so insubstantial as to not require further argument.

STATEMENT OF THE CASE

Appellee will rely on Appellant's statement of the preliminary matters (Opinion Below, Jurisdiction, Constitutional and Statutory Provisions Involved, Questions Presented, and Statement of the Case). However, Appellee wishes to point out a few additional pertinent facts. In order to place these facts in context it is necessary to briefly summarize a portion of the proceedings in the case.

On January 30, 1978, a petition alleging that Appellant, Roy Glen Swink, had engaged in delinquent conduct was filed in the District Court of Stonewall County, Texas, sitting as a juvenile court. (Transcript, page 1; hereinafter T.___) On February 22, a diagnostic study of Swink was requested. (T. 8). An order for such a study, which is required by §54.02(d), TEX.FAM.CODE (Vernon's, 1975), issued on the same day. This diagnostic report was completed on March 13 (Statement of Facts, page 169; hereinafter S.F.____) and filed along with a petition requesting the juvenile court to waive its jurisdiction. (T. 19-22). On the same day, the court set a hearing on the transfer request for March 17.

A copy of the diagnostic history was given to the attorneys for Swink on March 14. (S.F. 22-23). On March 15, Swink and his attorneys moved for a continuance. (T. 27-28). There is no order in the record showing that the hearing was reset. However, no hearing was held on March 17; and on March 28 Swink again moved for a continuance of the transfer hearing. The first paragraph of the March 28 motion indicates that the hearing was then scheduled for March 29. One of the reasons urged in support of the motion was that Swink's attorneys wanted to take the deposition of the psychiatrist who participated in the preparation of the diagnostic report. (T. 33). The motion was granted and the hearing continued until April 13. (T. 34). On April 11, Swink and his attorneys filed yet another motion for continuance. (T. 56-57). This motion was granted on April 12. (T. 58).

The transfer hearing was held on May 26, 1978. (T. 84). The diagnostic report was introduced at the hearing. (S.F. 76, 78, 99, 158-75). Appellant Swink challenges only those portions of the report which appear on pages 162-69 of the Statement of Facts. (Appellant's Jurisdictional Statement, 16-17.) The entire report is attached as Appendix A.

The diagnostic report includes summaries of interviews with various persons. All the persons interviewed are identified by name. There was no showing at the transfer hearing that Appellant Swink or his attorneys had made any attempt to contact any of the individuals interviewed. There was no showing at the transfer hearing of any reason why the persons interviewed could not have been contacted by Swink's attorneys.

ARGUMENT AND AUTHORITIES

I. THE ADMISSION IN EVIDENCE OF CERTAIN NON-EXPERT, HEARSAY PORTIONS OF THE DIAGNOSTIC REPORT DID NOT UNCONSTITUTIONALLY DENY APPELLANT SWINK DUE PROCESS OF LAW.

A. The Sixth Amendment confrontation clause does not apply to a juvenile transfer hearing.

The Sixth Amendment guarantees the right of a person accused of a crime to confront the witnesses against him or her. This right has been determined to be fundamental, and therefore applicable to the states through the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400, 403 (1965). The Sixth Amendment, however, does not of its own force apply to juvenile proceedings in state courts. McKeiver v. Pennsylvania, 403 U.S. 528, 542, 554 (1971). It follows that the Sixth Amendment does not, of its own force or as made applicable to the states through the Fourteenth Amendment, require the exclusion of the diagnostic report which is the center of controversy in the present case.

This makes sense. In a juvenile transfer proceeding no life or liberty is at stake. It is not a criminal proceeding in the sense that there is no determination of guilt or innocence. At stake is the state-created right to be tried in a juvenile court rather than a criminal court. The ultimate issue to be determined is whether "because of the seriousness of the offense or the background of the child the welfare of the community requires criminal proceedings." §54.02(a)(3), TEX.FAM.CODE (Vernon's, 1975).

B. Fundamental fairness and due process of law do not require the exclusion of non-expert, hearsay evidence at a juvenile transfer hearing.

While the Sixth Amendment does not apply to proceedings such as those which are the subject of this case, the due process clause of the Fourtheenth Amendement requires that such proceedings accord a juvenile fundamental fairness and due process of law. Under the fundamental fairness analysis, juveniles have been held to have various due process rights, including the right to confrontation of witnesses in an adjudication hearing. In re Gault, 387 U.S. 1, 57-58 (1967). The fundamental fairness analysis also has led to the conclusion that a trial by jury is not required in a juvenile adjudication proceeding. McKeiver v. Pennsylvania, supra, at 548.

The same fundamental fairness analysis has been applied to a transfer or waiver hearing, such as the present one. Kent v. United States, 383 U.S. 541 (1966). Appellant relies on Kent to support the proposition that the state may not present any evidence in a transfer hearing except through direct testimony. This reliance on Kent is misplaced. Kent determined that a hearing is required in transfer situations; that juveniles have a right to counsel in such hearings; and that the court must articulate the reasons for its decision. Kent decided more, however:

> We do not mean by this to indicate that the hearing to be held must conform with all the requirements of the criminal trial or even of the usual administrative hearing; . . .
>
> With respect to access by the child's counsel to the social records of the child, we deem it obvious that since these are to be considered by the Juvenile Court in making its decision to waive, they must be made available to the child's counsel. . . . There is no doubt as to the statutory basis for this conclusion. . . [Emphasis added.]
>
> 383 U.S. at 562.

This brief passage makes two things clear. First, the hearing which is required in a transfer situation is not necessarily an adversary hearing in the strict, criminal sense. Accordingly, there may be a relaxation of the strict rules of evidence which apply to criminal procedings. Second, this Court implied that there was no constitutional objection to the use of hearsay testimony in the form of "social records" in such a transfer hearing. This Court noted that there was a statutory basis for requiring that the juvenile's counsel have access to these records; but it had no constitutional objection to the use of these records by the juvenile court. The situation in Texas is analogous to that in Kent. The process which is due in a transfer setting has previously been determined in Kent. It is therefore unnecessary at this time to engage in the "interest analysis" mandated by Morrissey v. Brewer, 408 U.S. 471, 482 (1972). In order to affirm this case, this court need only determine that Texas' procedures are approved by Kent. In order to decide whether the State of Texas accords juveniles fundamental fairness and due process of law under Kent, it is necessary to examine these procedures.

1. The hearing which is the subject of the present inquiry is only the first step in a three part proceeding.

§54.02 TEX.FAM. CODE(Vernon's 1975, and 1980 Supp.) provides the framework for a "Waiver of Jurisdiction and Discretionary Transfer to Criminal Court." The statute is set out in its entirety in Appendix B.

The initial, transfer hearing, at issue herein, is held before the court without a jury. §54.02(c). The ultimate issue is whether the safety of the community requires criminal proceedings. §54.02(a)(3). In making this determination,

the court is directed to consider (1) whether the alleged offense was against a person or property; (2) the aggressive or premeditated nature of the alleged offense; (3) whether there is evidence on which a grand jury may be expected to return an indictment; (4) the maturity of the child; (5) the prior behavior of the child; and (6) the prospects for adequate protection of the public and the likelihood of rehabilitation of the child through use of the facilities available to the juvenile courts. §54.02(f). The juvenile court is required to obtain a diagnostic study, such as the one which is the subject of controversy here. §54.02(d). At least one day prior to the transfer hearing, the court must provide the attorney for the child with access to all written materials to be considered by the court in making the transfer decision. §54.02(e).

If a transfer to the criminal court is approved, there is a second procedure: a mandatory examining trial. The examining trial is governed by Chapter 16, TEX. CODE CRIM. PROC. (Vernon's, 1977). The same rules of evidence apply as in a criminal trial. Art. 16.07. In the examining trial, the accused has the right to confront witnesses against him. Art. 16.08. Counsel for the accused may examine witnesses on direct or cross-examination. Art. 16.06. At the examining trial, the state must establish that there is probable cause to believe that the accused committed the alleged offenses. If the court fails to find probable cause, the accused must be remanded to the juvenile courts. Ex parte LeBlanc, 577 S.W.2d 731 (Tex.Crim.App. 1979). The examining trial is mandatory. An indictment returned before the examining trial is conducted is void. Menefee v. State, 561 S.W.2d 822 (Tex.Crim.App. 1977).

If the examining trial finds probable cause, there comes a third procedure. The accused must be indicted by a grand jury, in regular grand jury proceedings. An indictment returned against an accused juvenile after an examining trial has discharged and remanded him to juvenile court is void. Ex parte LeBlanc, supra. The only way a juvenile can waive his right to an examining trial is by written waiver or waiver in open court. §51.09, TEX.FAM.CODE (Vernon's 1975).

§54.02(g), TEX.FAM.CODE (Vernon's 1975), provides that a juvenile may not be subject to a second transfer hearing when the first transfer hearing results in a decision to retain jurisdiction. §54.02(i) provides that the criminal court "shall certify the grand jury's failure to indict to the juvenile court. On receipt of the certification, the juvenile court may resume jurisdiction of the case." Thus, a failure of evidence at either the examining trial or the grand jury level results in the remand of the juvenile to the juvenile courts. The importance of this is two-fold. First, the Texas Court of Criminal Appeals has indicated that a decision of the juvenile court to retain jurisdiction, by the criminal court that there is not probable cause, or by the grand jury not to indict, is irreversible. Menefee v. State, supra, at 828. Second, the existence of the examining trial and grand jury procedures guarantees that no juvenile will be tried as an adult unless there is significant credible and admissible evidence that he or she has committed a felony.

2. The interests which confrontation seeks to protect are protected by other means in this context.

The interests which the confrontation clause seeks to protect are basically those of accuracy and truthfulness. Absent witnesses are not under oath, are not subjected to

cross-examination, and the fact finder has no opportunity to observe their demeanor. California v. Green, 399 U.S. 149, 155 (1970). The right to confront witnesses acts a guarantee that the government will not take action which deprives an individual of liberty unless there are significant guarantees of the truth of the information on which the action is based. In the present situation, the State of Texas has provided other guarantees that an accused juvenile will not be deprived of his liberty on the basis of inaccurate information. This is all that due process requires.

The first guarantee is that the court is required to hold a hearing at which the child or his attorney may call witnesses of his own choice and present evidence of mitigating circumstances. This procedure provides an opportunity for the child to show that there are reasons why he should not be transferred from the juvenile court. In addition, Texas law specifically provides that counsel for the child shall have access to the records which will be considered by the court in making the transfer decision. Counsel for the child thus has an opportunity to examine and impeach the records.

These considerations are extremely compelling in the present case because counsel for the child had copies of the report about which he now complains two and a half months before the transfer hearing. (SF. 22-23; T. 84) The diagnostic report provides the names of all the persons interviewed, as well as those of the interviewers. If Appellant had serious objections to the accuracy of the statements contained in the diagnostic reports, he had ample opportunity to contact the persons who made the statements. He also had the right to call them as witnesses and examine them about their prior statements at the transfer hearing. The record does not show that he did either of these things.

Moreover, the evidence to which Appellant objects is of limited significance. In the transfer determination, it is of consequence only insofar as it establishes whether or not a grand jury may be expected to return an indictment. There was direct evidence as to all the other factors enumerated in §54.02(f). There was direct evidence in the transfer hearing, provided by the sheriff who investigated the crime, of the fact that the offense was an offense against persons. (S.F. 30). There was also direct evidence concerning the aggressive or premeditated nature of the crime. (S.F. 30-32). In fact, there was an opinion offered that a grand jury could be expected to return an indictment against the accused in this case. (S.F. 34-35). A portion of the diagnostic report to which Appellant has not objected provided information concerning the sophistication and maturity of the child. (S.F. 170-74). An expert witness was qualified and testified concerning her evaluation of the sophistication and maturity of the child. (S.F. 100-102). The record and previous history of the child were also provided in a portion of the diagnostic report to which Appellant has not objected. (S.F. 159-61). Finally, there was testimony at the transfer hearing concerning the prospects of adequate protection of the public and the likelihood of rehabilitation. (S.F. 104-05; 109-10; 115). There was also testimony that, among the juvenile facilities available to the court, there were none which provided a maximum security setting, or even fences. (S.F. 129-31).

In these circumstances, the credibility of the evidence to which Appellant objects is not an issue. The evidence offered goes only to show that statements have been made which support the allegations of a crime. In re Honsaker, 539 S.W.2d 198 (Tex.Civ.App--Dallas, 1976), writ ref'd, n.r.e.

This is so because, at the transfer hearing, there is only the most preliminary determination of the facts of the crime. The examining trial and grand jury procedings, which must take place before a child may be tried as an adult, guarantee that no child will be so tried unless based on admissible evidence, there is probable cause to believe that he is guilty of a crime.

II. THE COURTS BELOW, IN THEIR APPLICATION OF §54.02(f)(2) and (6), TEX.FAM.CODE (VERNON'S, 1975), DID NOT DENY APPELLANT SWINK DUE PROCESS OF LAW BY PRESUMING HIS GUILT.

The first reason why Appellant Swink was not denied due process by §54.02(f)(2) and (6), is that this is not a criminal proceding. "Presumption of innocence" is a shorthand way of saying that the state has the burden of proof in criminal matters. At a transfer hearing, there is no determination of guilt or innocence of a crime. The only determination to be made is whether the prospective trial will take place in criminal court or in juvenile court. The foci of inquiry are the safety of the community, and the resources available to deal with the child if the case is retained in juvenile court. In such a situation, the "presumption of innocence" has no application.

Even if the presumption of innocence did apply in this situation, there is no violation of it in the Texas statutes. Appellant is simply playing semantic games. It is obvious that §54.02(f)(2) and (6) merely ask the court to consider what the consequences for the general welfare would be <u>if</u> the child were found guilty of the crime. This is shown by the inclusion among the factors to be considered by the court, "whether there is evidence on which a grand jury may be expected to return an indictment." If the court is to consider <u>whether</u> there is such evidence, it cannot be presuming the guilt of the child.

Appellant points to no statement by the court or any witness, no fact established in the proceedings, nothing whatsoever which has occurred, which shows that the court ever presumed him guilty. More important, and more in line with the actual nature of the "presumption of innocence," the courts below have not ever required Appellant to either prove his innocence or suffer penalties.

CONCLUSION

The State of Texas has provided a three part procedure by which a juvenile may be transferred to a criminal court and tried as an adult. The first part of that procedure is under scrutiny here. This portion of the proceedings determines whether the safety of the public requires that the child be transferred to criminal courts for trial. Later stages, not under scrutiny here, guarantee that a juvenile will never come to trial in a criminal court unless there is probable cause to believe, on admissible evidence, that the child actually committed the alleged crime. In this case, in the first stage of this three stage procedure, the state has used a written summary of interviews with prospective, named witnesses as one means of establishing that there is evidence on which a grand jury may be expected to return an indictment. The State of Texas has provided the juvenile with an opportunity to be heard, an opportunity to view the documents to be introduced in evidence, and the opportunity of an examining trial which would more closely scrutinize the evidence concerning the crime. The conclusion is inescapable that the State of Texas has accorded Appellant due process of law.

Appellant's objection that the State of Texas, by its wording of a portion of the Texas Family Code, has presumed him guilty of a crime is meritless. The presumption of

innocence does not apply to the situation in which appellant finds himself; and even if it did the statute in question does not actually make any such presumption.

For these reasons, the State of Texas concludes that the questions raised by appellant are not substantial, and this case should be affirmed on the record as it stands.

Respectfully submitted,

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ATTORNEYS FOR APPELLEE

APPENDIX A

TO: Joseph Thigpen
District Attorney
39th Judicial District
Haskell, Texas

FROM: George Maxwell
Joyce Talbott
Juvenile Office
Taylor County

DATE: March 1978

SUBJECT: Roy Glen Swink

DOB: March 16, 1961

AGE: 16 years of age

NOTE: The following information was obtained from Mr. and Mrs. Wayne Swink, the aunt and uncle of the subject in an interview conducted on March 8, 1978 by Joyce A. Talbott, Assistant Juvenile Officer, Taylor County.

NATURAL MOTHER: Berta Mae Smith Swink was born October 21, 1932. After a two year period of cancer, she died September 23, 1976. Berta Mae Swink received a high school education and professed the Baptist religion.

According to Wayne Swink, she was employed by their feed store for six years as a bookkeeper. Her interests included sewing, carriage, and other artistic talents. Mrs. Wayne Swink related that she was quiet, organized and personable.

Berta Mae's first marriage was to Isiah Eddie Smith from October 21, 1949 to May 16, 1960. According to Mr. and Mrs. Wayne Swink, Mr. Smith was alcoholic. Two children, Eddie Dale and Nolan Douglas were born to this marriage. When the divorce was given to Berta Mae and Isiah Eddie Smith, custody of the children was granted to the grandparents. Mr. and Mrs. Swink were not aware of the reason why Berta Mae did not receive custody of the children.

STEP-MOTHER:

Ilke Ilene Brown Swink was 27 years of age and was born May 9, 1950. She was raised and lived in the Hamlin area, the youngest of eight children, all of her life. Ilke Ilene married Sandy Gilley on August 19, 1967. According to Mrs. Swink, she did not complete her high school education due to the fact that she married Mr. Gilley. Ilke Ilene and Sandy Gilley's first child, Sandy Shane, was born July 17, 1967. Their second child, Delinda Dawn, was born February 15, 1973. This marriage ended in divorce March 11, 1977. Custody of both children was granted Sandy Gilley and these children live in the home of their grandparents.

Ilke Ilene worked for a short period of time at the T. and J. Superette but terminated her position shortly before her death due to her pregnancy and possibly other health reasons.

According to Mr. and Mrs. Swink, Ilene was energetic, friendly and very different from H. W. Swink's first wife, Berta Mae. In describing how Ilene and Berta Mae differed in personality, the Swink's related that Berta Mae was always calm, more mature, and in control. The Swinks related that Berta Mae always put Roy in his place when she needed to do so.

NATURAL FATHER:

Herman Welon Swink is 38 years of age and was born October 6, 1939 in Aspermont, Texas. He received a high school education and professed the Baptist Religion. He worked as the general manager at Wayne Swinks Feed Store for the past eight or nine years.

According to Wayne Swink, he was friendly, energetic and aggressive. Mr. Swink was never in the service, did not use alcoholic beverages, and had never received psychiatric treatment.

His interest and hobbies were centered around his children, according to Wayne Swink, and he enjoyed working with his boys preparing stock for showing purposes.

Herman Swink's first marriage was to Berta Mae Swink on October 21, 1949. Two children were born to this marriage: Roy Glen Swink, age 16-the subject; and Royce Wayne Swink, deceased.

Mr. Swink's second marriage was to Ilke Ilene Swink on March 30, 1977. According to Mr. and Mrs. Swink, Ilene was about four months pregnant at the time of her death.

SUBJECT:

Roy Glen Swink is 16 years of age and was born March 16, 1961 in Lubbock, Texas. Mr. Swink was not aware of any severe childhood diseases or of any complications at the time of Roy's birth.

Roy was employed by his uncle, Wayne Swink, at his Feed Store and performed various duties there. He was a junior at Aspermont High School, was involved in athletics, and according to the Swinks, made A's and B's.

Mr. and Mrs. Swink related that Roy was a fast driver and had received several traffic tickets for speeding. According to the Swinks, if he had received one more ticket, he would have lost his license.

The Wayne Swinks related that Roy had been dating Betty Patton and believed that she had received a promise ring from him around Christmas. According to the Swinks, Betty was active in school, a cheerleader, and made good grades. Roy visited Betty Patton, in the hospital the night of January 23, 1978. When Roy left the hospital that night, he was of the impression that Betty Patton was pregnant because a doctor had related this information to her. Mr. and Mrs. Swink related that even though they knew that H. W. Swink had suspected that Betty Patton might be pregnant (He had previously told Roy, according to Mr. and Mrs. Wayne Swink, that if Betty ever did become pregnant that he would not help Roy and her financially or in any other way.) discovery of this situation as fact would be quite an emotional blow to H. W. Swink.

According to Mr. and Mrs. Swink, Roy always did everything very quickly and seemed to always have the desire to be "on the go". He was very organized and extremely particular.

SIBLINGS:

Royce Wayne Swink, a brother to the subject, was 14 years of age and was born April 1, 1963 at Lubbock, Texas. He was also a victim of the homicide on January 24, 1978 .

According to the Wayne Swink's, Roy and Royce were not extremely close. Both boys pursued separate and different interests. The Swink's related that after Berta Mae's death, Roy seemed to assume the responsibility of caring and looking after Royce. However, after H. W. and Ilene's marriage, this relationship ceased.

NOTE: The following information was obtained from reports compiled by the District Attorney's Office, Haskell County.

Mr. Larry Beauchamp of the District Attorney's Office, Haskell, Texas was contacted in regards to a triple homicide in Aspermont, Stonewall County, Texas. Upon entering the residence of Herman Welon Swink, the body of Royce Wayne Swink was located in the utility hallway; the body of Herman Welon Swink was observed in the front entrance hallway and the body of Ilke Ilene Swink was observed in the northeast bedroom of the residence. From the appearance of the wounds, a shotgun was used to commit the alleged offense.

Another member of the family, Roy Glen Swink, reportedly "escaped" through a bedroom window and drove to the residence of his uncle, Wayne Swink, Subsequent investigation revealed that it would have been impossible for Roy Glen Swink to have escaped through the bedroom window as he stated.

INTERVIEWS: Interview of Dr. Lesley Serrano:

Two interviews were held with Dr. Serrano, who was present and examined Roy Swink when he was admitted to the emergency room of the Aspermont Clinic, at 5:15 a.m., Tuesday, January 24, 1978. The interviews were conducted by Larry Beauchamp on January 26, 1978 and January 27, 1978.

On January 26, 1978, Dr. Serrano advised that the wound on the left upper back of Roy Swink was at an angle and was a puncture type wound. She had the impression it was made by a sharp pointed instrument of some type. Not really like a nail, but a sharp pointed instrument.

On January 27, 1978, Dr. Serrano advised that the hospital records showed Roy Swink was admitted to the emergency room at 5:15 a.m., Tuesday, January 24, 1978, at which time his blood pressure was 138/70 and observed by Mrs. Dasari, R.N., at the emergency room along with an aide, Bessie Trammell, of Jayton, Texas.

Dr. Serrano advised that she put two stiches in the left back of Roy Swink for a puncture wound. She got the impression of the wounds being in some type of pattern and was surprised that the cuts were supposed to be received from glass. She thought the patient was apprehensive but did not feel that he would actually go into shock. To her, the patient did not seem to be too upset. Dr. Serrano had the impression that the wounds were similar to a knife cut. This thought was instigated by her past experiences with drug addicts and she felt that the wounds could have been self-inflicted.

Interview of Grace Dasari, R.N.

An interview was conducted by Larry Beauchamp and Marshall Brown at 3:30 p.m., Wednesday, February 15, 1978, at Mrs. Grace Dasari's residence.

Mrs. Dasari advised that there was no bleeding present when she examined Roy Swink at the emergency room. She did not believe that the wounds on the body of Roy Swink were glass cuts. The blue jeans that Roy Swink had on appeared fresh to her.

Interview of Betty Jane Patton:

An interview was conducted by Larry Beauchamp and Ranger Marshall Brown on Saturday, 2:05 p.m., January 28, 1978, at the residence of Betty Jane Patton, approximately six miles north of Aspermont.

Betty Patton advised that on Monday, January 23, 1978, Roy Swink arrived at the Stamford Hospital at approximately 6:15 p.m. They discussed whether or not she was pregnant as her doctor had advised her that she was. Betty and Roy also discussed whether or not to tell Roy's parents. According to Betty, Roy's plans were to tell his parents about her pregnancy if they were up-or (if not) he would wait until the next morning to tell them. They did talk some about marriage.

Betty Patton related that Roy told her that when he told his parents about her being pregnant, they might get mad at first but everything would be all right.

A second interview was conducted on February 16, 1978 at 3:00 p.m. at the Stonewall County Sheriff's Office.

Betty Patton advised that her father was in the hospital in Big Springs the first week of January, and sometime in the second week of January, Roy was supposed to go with Betty to take the family automobile to Big Spring and get her mother. Her mother had requested Roy ride with her. She further stated that Roy did not get to go due to his father and when she returned on Saturday, January 7, Roy had a number of marks on his back, some whelp-type marks, and Roy advised her that his father had whipped him with some bailing wire and created the marks. Betty advised that there were approximately ten whelps and were completely across Roy's back.

Roy had told Betty on a couple of occasions that he could not do anything right and Royce couldn't do anything wrong. In H. W.'s eyes, Royce could do no wrong and Roy did everything wrong.

Interview of Kathy Maxwell:

An interview of Kathy Maxwell was conducted by Larry Beauchamp on January 29, 1978.

Kathy advised that she had heard that H.W. was going to pay for an abortion for Betty Patton if they wouldn't get married. H. W. Swink thought Roy was too young to get married, and he didn't want Roy and Betty to get married.

According to Kathy, Roy Swink did not like H.W. and Ilene getting married. She got the impression that Roy resented the marriage, although he would never say anything about Ilene, just shrug his shoulder, if asked anything about it.

Interview of Mrs. Jo McAnally:

An interview was conducted by Mr. Beauchamp on February 1, 1978 at 4:30 p.m., with Mrs. Jo McAnally at the Stonewall County Sheriff's Office.

Jo McAnally advised that Ilene was having lots of trouble with Roy. One time that she knew of, H. W. had gone out of town to a funeral and Ilene wouldn't let Roy stay out real late that night. Roy became very mad and upset about this. She knew that H. W. and Ilene had been having trouble with Roy for a period of months involving his staying out late and other problems.

Back in the summer, Roy had come to her about a job in her husband's grocery store. He wanted to leave the feed store because of an incident that happened in reference to him taking a break. Roy was high-tempered and when he came to her to talk to her about the job during the summer, he was still very upset that evening, even though the incident had occurred in the morning.

Around the first of the year, Ilene had told Jo McAnally that H. W. had advised Roy, if Betty ever got pregnant, that H. W. would not help him and Roy would have to raise it himself. Ilene related to Jo that H. W. had been out of town and come home and found Roy and Betty Patton in bed at the Swink's residence.

Jo McAnally advised during the time when Ilene was working in their store, Roy had come into the store and crossed Ilene out real badly.

On Monday, January 23, 1978, in the afternoon, Ilene came into the store and asked if Jo was going to Abilene on Wednesday, and said she wanted to go with her as they usually went together. Ilene stated that there was something that she really needed to talk to Jo about. At this time, the oldest daughter asked about Betty Patton, and he did not get much of a reply from Ilene.

Since the funeral, Betty Patton had eaten lunch with the McAnallys and made the statement that if Roy ever remembered what happened, he would be in prison for life, and if he did not remember, she did not know what might happen.

Interview of Tammy McAnally:

On Wednesday, February 1, 1978, Larry Beauchamp interviewed Tammy McAnally at the Stonewall County Sheriff's Office at 5:45 p.m.

Tammy knew that Roy and Ilene had lots of troubles. Ilene gave Royce more attention than she did Roy. When Roy Swink wanted something, he wanted it right then and didn't want to wait, according to Tammy. The implications of this interview were that Roy Swink had a volatile temper. According to Tammy McAnally, Roy and Betty had had a big fight at the homecoming and Roy had twisted Betty's arm. Roy had also become very upset one night when Betty had gone with her friends instead of going with him. To Tammy's knowledge, Roy and Betty fought every day.

Interview of Tom McAnally:

On Wednesday, February 1,1978 at 3:45 p.m., Larry Beauchamp interviewed Tom McAnally at the Stonewall County Sheriff's Office.

Tom related that he knew that Ilene and H. W. had had trouble with Roy all the time and thought that Roy probably resented Ilene. Roy Swink had talked to him about an incident that happened before Ilene and H. W.'s marriage. Roy had returned home unexpectedly and had caught Ilene and H. W. doing something. Roy had later discussed this incident with Tom McAnally and stated at that time that he guessed that they should go ahead and get married the way they were acting.

Tom related that he felt that the resentment of Roy toward Ilene started at the time before H. W. and Ilene were married and Roy caught them at the house.

Interview with Diane Lambert:

On March 13, 1978, an interview was conducted by Joyce Talbott, Assistant Juvenile Officer, Taylor County, with Diane Lambert in the Taylor County Courthouse, Abilene, Texas.

Mrs. Lambert related that she had known the late Ilene Swink around thirteen years and that Ilene had confided in her about various different matters prior to her death.

Ilene had related an incident to Diana regarding Roy and his not wishing to wash dishes one night. A system had been worked out in their home, whereby Roy would wash dishes one night and Royce would do them the next. One night, around Christmas, Roy had refused Ilene's request that he take his turn at washing the dishes. Ilene did not pursue the matter but when H.W. became involved, he insisted that Roy wash the dishes. Roy's reply was that if he had to wash the " " dishes, he would break every one of them and he proceeded to do just this.

Diane Lambert had given a baby shower for a friend and after the shower, Ilene Swink had had trouble with her car battery. Diane overheard parts of Ilene's conversation with Roy Swink and Ilene had also related parts of this conversation to Diane. When Ilene told Roy that the car battery was dead, he asked her where the "hell" she was. She then advised Roy not to talk to her that way, and to have H.W. come to the phone. Roy replied that if she wanted to talk to H.W., she would have to call back. Roy then hung up the phone. Ilene returned the call, spoke with H.W., and later H.W. came to help her with her car battery.

Diane was also aware of an incident when H.W. had taken Roy's keys away from him and given them to Ilene. This was during the time that Ilene was working at the T.&J. Superette Store. According to Diane, Roy had come to the store and asked Ilene for the keys. When she did not give them to him, Roy become upset and cursed Ilene.

Diane had heard of an incident when Roy had been requested by Ilene to clean out a closet. Roy did not comply with this request. When H.W. became aware of this incident, he and Roy become involved in a physical scuffle and H.W. knocked Roy to the floor. Diane had heard rumors that H.W. did use rather severe punishment on his kids but had never seen conclusive evidence to this effect.

Diane related that according to conversations with Ilene, everything seemed to run very smoothly in the family immediately after H.W. and Ilene married. She then got the indication from Ilene that problems had arisen between Ilene and Roy. Ilene would make concessions for Roy and in a way "tiptoe around him". Shortly before Ilene's death, Diane felt that Ilene had given up and had quit trying to make Roy pleased or satisfied with her actions because he would not respond favorably anyway.

Diane Lambert described Roy as more independent, not the type to rely on his parents or anyone else. According to Mrs. Lambert, he had owned his own car for quite some time; Roy would often go to town and eat rather than have meals with his family; and overall, he was more separated from the family, content as long as no one bothered him and he was allowed to act as he desired.

Mrs. Lambert described Roy as head-strong and determined. According to Diane, Roy would think about things before he acted and once he decided he wanted something, he would get it. She described Roy as being quiet and related that he appeared hesitant to allow social contact-that he did not encourage people talking to him, cut them off sharply if he was spoken to.

Diane related that H. W. Swink was very good to Ilene, that he seemed to place Ilene "on a pedestal". According to Diane, Royce and Ilene also got along very well and many times Royce would stand up for Ilene. Royce's attitude seemed to cause a clash between Royce and Roy.

A psychological evaluation was conducted on February 23, 1978 by Jim Ford and will be included in this Social History.

A psychiatric evaluation was conducted on March 1, 1978 by Dr. W. Kenneth Day, 270 Leggett, Abilene, Texas and will be made a part of this Social History.

A physical was performed by Dr. Irby Fox, 1227 N. Mockingbird, Abilene, Texas on March 6, 1978 and will be included in this report.

THIS SOCIAL HISTORY HAS BEEN PREPARED BY JOYCE A. TALBOT, ASSISTANT JUVENILE PROBATION OFFICER, TAYLOR COUNTY, ABILENE, TEXAS. 03-13-78.

CONFIDENTIAL

PSYCHOLOGICAL REPORT

Name: Roy Swink
Date: Feb. 23, 1978
Birthdate: March 16, 1961

Race: Anglo
Sex: Male
Age: 16
Examiner: Jim Ford

TECHNIQUES ADMINISTERED

Wechsler Adult Intelligence Scale

Verbal IQ: 97

Performance IQ: 107

Full Scale IQ: 102

Bender Visual-Motor Gestalt Test

Koppitz Score: 0 (maximum score possible)

House-Tree-Person

Minnesota Multiphasic Personality Inventory

Thematic Apperception Test

Cards 1, 1SB, 2, 14, 1SBM, 1SWF, 8BM, 12BG

Sentence Completion Test

OBSERVED BEHAVIOR

Roy is an average sized, 16-year-old, Anglo boy with moderately long blond hair, a slight moustache, and blue eyes. He appeared well coordinated and used his right hand consistently. He was very verbal and quick to respond, and as a result, a high level of rapport was easily established and maintained. On many of the tasks presented him, he asked for additional guidance, but responded quickly once the instructions were made clear. He seemed to try hard to do well throughout the evaluation, and accepted failure in a realistic manner.

EVALUATION OF TECHNIQUES ADMINISTERED

Wechsler Adult Intelligence Scale. Based on his WAIS Full Scale IQ of 102, Roy's current overall level of intellectual functioning is apparently within the Average range compared to other people his age. His Verbal I.Q. of 97 and his Performance I.Q. of 107 were also in the Average range. His Performance I.Q. was somewhat higher than his Verbal I.Q. Within the Verbal Scale he scored significantly low, relative to his

average Verbal Subtest Scale Score, on the subtest designed to measure associative thinking and general comprehension of facts acquired in the home and school. He scored significantly high on the subtest designed to measure both abstract and concrete reasoning abilities. Within the Verbal Scale he scored significantly high, compared to his average Verbal Subtest Scale Score, on the subtest designed to measure visual-motor coordination, simple assembly skills, the ability to see spatial relationships, and the ability to synthesize concrete parts into meaningful whole. This pattern of scores is sometimes seen in subjects who have a tendency toward anti-social or delinquent behavior.

WAIS subtest scale scores are listed below:

VERBAL SUBTESTS	PERFORMANCE SUBTESTS
Information - 6	Digit Symbol - 10
Comprehension - 10	Picture Completion - 11
Artithmetic - 7	Block Design - 10
Similarities - 12	Picture Arrangement - 9
Vocabulary - 7	Object Assembly - 14
Digit Span - 10	Mean - 10.8
Mean - 8.7	

Bender Visual-Motor Gestalt Test. Roy's Bender reproductions yielded the maximum score possible using the Koppitz scoring method, which suggest no significant delay in visual-perceptual-motor development. His manner of drawing the designs suggests feelings of insecurity, but overall optimism.

House-Tree-Person. Roy's H-T-P drawings are indicative of generalized anxiety and insecurity and social uneasiness. He apparently has a need to maintain an acceptable facade in interpersonal relationships, and probably feels inadequate in his attempts at close personal relationships.

Minnesota Multiphasic Personality Inventory. Roy's responses to the MMPI statements suggest slight immaturity, expecially in social contacts. He is probably somewhat suggestible and seems to have varied interests. His answers were defensive in nature and profiles similar to his have been associated with family conflict.

Thematic Apperception Test. Based on his TAT stories, Roy is mildly independent and tends to attempt to cope with his problems without external help. He also seems to be optimistic and to view things in a positive manner.

Sentence Completion Test. Home conflict was indicated in Roy's sentences and the impression of overall optimism was reinforced. His responses seemed to indicate a high respect for authority and a conformity to standards imposed on him.

Conclusions. Intellectually, Roy appears to be currently functioning in the Average range. His strongest educational asset appears to be a higher than average ability in both abstract and concrete reasoning. Overall, he does not seem to be suffering from any serious emotional difficulty, however some conflict and anxiety associated with his family relationships was evident. He is apparently independent, yet tends to react favorably to authority figures. Even though he appears currently to have feelings of insecurity and inadequacy, there appears to be an overall attitude of optimism present.

Edwin B Headrick

Edwin B. Headrick, Ph.D.
Psychologist

Jim Ford

Jim Ford, M.S. Candidate
Psychometrist

W. KENNETH DAY, M. D.
PSYCHIATRY
ABILENE, TEXAS 79605

March 1, 1978

Mr. Joe Thigpen
District Attorney's Office
Haskell County Courthouse
Haskell, Texas 79521

Re: Roy Swink

Dear Mr. Thigpen:

This is a report of a psychiatric evaluation on Roy Swink, age 16 years and 11 months. I saw Roy today with his attorney, Mr. Mike Brown, of Lubbock, Texas. Roy stated his biggest problem was attempting to understand why he is being accused. He describes himself as making good grades in school, having no problems in school, having no trouble with his family or friends. He is reasonably smart, reasonably happy, healthy, helpful, and trying hard. He dislikes his size and would like to be bigger.

He describes his natural mother as real loving, always there, and helpful. She died of cancer two years ago. He describes his step-mother as nice, liking kids, and nothing wrong with her. He describes his father as the greatest person he ever knew.

He states he was born in Lubbock, Texas, the first of two boys, and believes he was wanted. He likes outdoors and cattle, he likes westerns, and he likes sports, going out with his friends, and his girlfriend. If he had three wishes, he would (1) be a football player (2) be rich (3) have his family back together. The bad feeling he's had most often in his life is feeling sad, particularly when his mother was sick and when he hit his little brother.

He believes if everything goes wrong, he will go to prison. He believes if everything goes right, he will finish high school, go to college, get married, and live on a stock farm. He hopes to live a long life and people will remember him as having a bad childhood but doing okay.

He started to school in Rankin and remembers his first grade teacher. He moved to Aspermont in the second grade and is now a junior in high school and claims to be doing well in school, but makes some C's.

MENTAL STATUS EXAM: Roy is 5'6" and weighs 145 pounds, he has an immature beard, he has pimples, and is appropriately dressed and neat. He is oriented as to time, place, and person, there appears to be no organicity, and he complains of some headaches since being arrested. His memory is intact, he denies any physical problems, and he is not taking any medications. He has worked most of the time in a feed store. He does not attend church regularly, but believes in God. He has had no sleep disturbance, except for being in jail. He denies feeling like he was going crazy, he denies hallucinations or delusions, and denies any suicidal attempts or any homicidal ideation. At times he appears to be unhappy and at other times he is able to smile. At times he appears as if he is about to cry. He appears to be of average intelligence, his response to proverbs is appropriate, and he appears to be action-oriented. There does not appear to be any inappropriate affect and he does not appear to be psychotic at the present time.

IMPRESSION: (1) Mentally competent (2) Not psychotic (3) Average emotional development and maturity.

RECOMMENDATIONS: Further evaluation with a MMPI or complete psychological testing by Dr. Harry Martin might be helpful in assessment and evaluation. If I can be of any assistance in this evaluation, I will be happy to do so.

Respectfully submitted,

W. Kenneth Day, M. D.

WKD:ykn

cc: Dr. Harry J. Martin
270 S. Leggett Drive
Abilene, Texas 79605

OFFICE 672-7863
W. IRBY FOX, B. A., SC. M., M.D.
1227 NORTH MOCKINGBIRD
ABILENE, TEXAS 79603
RES. 672-1124

March 6, 1978

Attorney Joe Thigpen,
Box 412,
Haskell, Texas 79521

Re: Roy Swink, Box 518
Aspermont, Texas

Dear Sir:

Enclosed is a physical on Roy Swink, born March 16, 1961. Examination was done in my office on March 2, 1978.

Roy Swink is a well developed, well nourished, blond, blue eyed, light skinned, white male, who appears to be alert, intelligent and cooperative. Weight - 155 lbs. Height - 5 ft. 5½ in.

HEAD, EYES, EARS, NOSE AND THROAT: One cavity in left upper jaw teeth. Teeth good otherwise. Eyes blue - normal reaction. Vision uncorrected R 20/15 - L 20/20. Color vision normal. Ears normal. Hearing normal with tuning fork. Tonsils present. Gums normal.

NECK: Normal.

CARDIO-VASCULAR-RESPIRATORY SYSTEM: Chest and lungs - B/P 110/60. Pulse 120 regular. No heart murmurs. Chest clear to inspection, palpation and auscultation. Chest circumference - 34½ inches - 3 inches maximum expansion. Waist - 29½ inches. Hips - 34 inches.

ABDOMEN: Normal - no surgical scars. Kidneys, spleen, liver not felt. No hernia.

GENITALIA: Normal adult circumcised male genitals, with normal adult pubic hair distribution.

NEUROLOGICAL: Normal neurological findings throughout. Eye reflexes normal. Radial and ulna periosteal reflexes normal. Biceps and triceps reflexes normal. Knee and ankle reflexes normal. Coordination good - finger to nose, finger to finger bilaterally. Babinski reflex negative. Rhomberg reflex negative.

DIAGNOSIS: Normal well built, adult size, muscular white male.

REMARKS: This young man agreed to the drawing of blood from r. forearm. The arm was cleaned with alcohol, dried thoroughly with sterile sponge and approximately 15 cc of whole blood was drawn in a sterile disposable syringe and this was injected into a dry container for this purpose, furnished by Texas Ranger Brown. This container was dated, and initialed by Ranger Brown, signed by me, label covered with scotch tape, then placed in the icebox for a few minutes. It was then given to Ranger Brown when he and Roy Swink left my office.

Sincerely,

W. Irby Fox, M.D.

WIF/nn
Enc. Bill enclosed.

APPENDIX B.

This Appendix to the Motion to Affirm was not of photographic quality but can be found at Section 54.02 of the Texas Family Code (vernon's 1975 and 1980 Supp.).